RECENT HOLDINGS OF GENERAL INTEREST

Kelso & Co. v. Ellis (1918, N. Y.) 121 N. E. 364, may well bring comfort to those who have been disturbed by the occasional tendency of some courts to branch out into variant interpretations of the provisions of uniform commercial acts. The New York Court of Appeals in that case took a long-hoped-for step toward uniformity in the law of negotiable instruments. It seems that from now on an antecedent or pre-existing debt will, in New York as well as elsewhere, constitute value for the transfer of an instrument, even though the transfer be only by way of security for that debt. To be sure, the anomalous decisions to the contrary in the lower courts of the state are not necessarily overruled by the actual holding in the instant case. That case might at a pinch be construed as involving not security for, but actual payment of, an antecedent debt. But the change in the court's attitude on the point is unmistakable.[1] The earlier cases are excused as revealing "the habit of bench and bar to look to cases rather than statutes for principles of commercial law until attention is sharply directed to the extent that the movement for uniformity of laws through legislation has been successful." Surely this is the *requiem* of the doctrine of *Sutherland v. Mead*.[2] The probable future action of the court is indicated in no uncertain terms. "It is perfectly clear that for the sake of uniformity New York has abrogated the rule which had been in force since the year 1822 . . . *Coddington v. Bay*[3] and section 51 [25, original notation] of the Negotiable Instrument Law are irreconcilable in the mind of any candid student of the decisions *in this and other jurisdictions.*"[4]

The power of administrative boards to revoke occupational licenses, while growing in extent, is subjected by the courts to strict compliance with due process of law and the technical requirements of the statute under which the board operates. This is illustrated in a recent Illinois case, *Blunt v. Shepardson* (1918, Ill.) 121 N. E. 263. Here a physican was notified to appear before an administrative board to show cause why his license should not be revoked. No charges were included in

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[1] The judgment below for the plaintiff was reversed, but only in order to let the jury pass on the plaintiff's good faith in taking the instrument. Crane, J., dissented: "on the ground that the evidence would not sustain a finding that plaintiff was not a *bona fide* holder *for value*." (Italics are the editor's.)

[2] (1903, N. Y.) 80 App. Div. 103, 80 N. Y. Supp. 504, construing the N. I. L. not to change the old New York rule that the giving of an instrument as *security* for an antecedent debt was not such a transfer for value as to make the taker a holder in due course.

[3] (1822, N. Y.) 20 Johns. 637.

[4] Italics are the editor's.

the notice. When he appeared he was informed verbally that the board had heard that he had been convicted of violation of the Harrison Drug Act. This he admitted, but stated that a writ of error had been granted and that he felt assured the verdict would be set aside. Shortly thereafter, without statement of any grounds, he received a notice that his license to practice had been withdrawn. On a petition for *certiorari,* the court held the entire proceeding irregular. The board should have notified him of the charges, in writing, and given him an opportunity to be heard on them; and the notification of withdrawal of license should have stated the specific reasons therefor. In other respects, technical departure from the statute was found. The court emphasized the necessity of a formal written record in such an important proceeding as the revocation of a license, and particularly the necessity that the order of revocation should show the facts conferring jurisdiction on the board. The propensity of boards of education and other administrative boards arbitrarily to exercise their power to revoke licenses is very properly becoming the object of close judicial supervision and of restriction within the limits of due process.[5]

It was pointed out in a previous number of the JOURNAL that the English cases refused rescission of an executed sale of property where a misrepresentation is innocently made, but that the recent cases quite properly settle the law to the contrary in this country.[6] To the cases cited in the earlier discussion we may now add *Gihon v. Morris* (1918, N. J. Ch.) 105 Atl. 455, where the court decreed recission of a completed sale and transfer of realty, because of an innocent misrepresentation. It is interesting to note that the court relied, *inter alia,* on general language in one of the English cases, without noting the distinction made in that country between contracts to sell and completed transfers of property.

The case of *Davis v. St. Paul Coal Co.* (1918, Ill.) 121 N. E. 181 shows that the Illinois courts still cling to the indefensible rule that a declaration which totally omits to allege an essential fact is so much of a nullity that an amendment adding the missing fact amounts, so far as the Statute of Limitations is concerned, to starting a new action. As the requirements which establish what facts must be alleged in the declaration, and what by way of confession and avoidance, are to a considerable extent arbitrary, reason and common sense are opposed to the Illinois rule. For the purpose of stopping the running of the Statute of Limitations an action should be regarded as started if

[5] See COMMENTS (1919) 28 YALE LAW JOURNAL, 391.
[6] (1918) 27 YALE LAW JOURNAL, 929.

enough facts are stated to inform the defendant of the general nature of the claim against him.[7]

When in the old days the judges took judicial notice that, in fact, men did not throw bricks *molliter* at a trespasser, it was put upon the ground that what all men know, the court might also know, without more. It would seem as if the same might hold of things all lawyers know; but the case of *Crume v. Brightwell* (1919, Ind. App.) 122 N. E. 230, shows this seeming to be at times illusory. Order promissory notes made and payable in Georgia were before the Indiana court, without any pleading of the Georgia law. The court found the law settled that it could not in any case take judicial notice of the statutory laws of other states; that there was a presumption that the common law, and so here the customary law merchant, prevailed in such other states; that by such law promissory notes, and therefore the notes in suit, were non-negotiable. California is doubtless extreme in her presumption that all other states have been moved to pass just such statutes as she herself.[8] The principal case is no less extreme on the other side. Surely it is common knowledge that the movement for uniform commercial laws has been on foot for years, and with considerable success; that the pioneer act was the N. I. L.; that even in 1912, when the notes in suit were made, that uniform act was law in three-quarters of the American jurisdictions. Might not a court take notice of these things? If there is any presumption as to such an act, under such circumstances, should it not rather be that of adoption?[9] But a court may be slow to presume progress in the law, whatever the fact. Good; shall the court therefore be quick to presume regress? There remains the statute of Anne. It was passed some seven decades before the American colonies took up separate existence; shall the colonies be presumed to have rejected it? It would seem that a time might come, in the ripe old age of a statute—at least

[7] For a discussion of the general subject, see (1918) 27 YALE LAW JOURNAL, 1053.

[8] *Peck v. Noee* (1908) 154 Cal. 351, 97 Pac. 865; *Cavallaro v. Texas & P. Ry.* (1895) 110 Cal. 348, 42 Pac. 918. But the holdings have not been wholly consistent. *Cf. North Alaska Salmon Co. v. Ryan* (1908) 153 Cal. 438, 95 Pac. 862.

The only rational regulation of judicial notice of foreign law, under present conditions, is one like that of Connecticut. There "the public statutes of the several states and territories in the United States, as printed by authority of the state or territory enacting the same, shall be legal evidence, and the courts shall take judicial notice of them." "The reports of the judicial decisions of other states and countries may be judicially noticed by the courts of this state as evidence of the common law of such states or countries, and of the judicial construction of the statute or other laws thereof." Conn. Rev. St. 1918, secs. 5726, 5727. This has been law for three-quarters of a century. Conn. Genl. L. 1849, 438.

[9] Georgia has in fact, however, failed as yet to adopt the N. I. L.

with one passed by the English Parliament before the Revolution—when it takes on the character of common law sufficiently to be presumed existent in another state. Even if not—is "common knowledge" to be limited wholly to non-legal facts? It is flying in the face of sense for the court to ignore what every lawyer knows, or for that matter, every business man: that throughout the United States order notes—whether by express statute in each state or not—have, with occasional minor differences of form, been as negotiable as order bills.[10] The validity of the court's conclusions as applied to the classes of statutes concerned in the present case, is therefore questioned. Even so, little harm would have been done, had not the "customary law merchant" been misconstrued as well. The theory that under the law merchant promissory notes were non-negotiable goes back to two hot-tempered decisions of Lord Holt;[11] it has found currency since, as in the present case.[12] But it was long ago shown that Lord Holt in his dislike of Lombard Street mistook his law merchant; that the statute of Anne was passed not to make new law but to declare anew old law that was good, and so bar Holt from further misdeclaring it; and that under the common law of England a promissory note to order stood, as a negotiable instrument, on the same footing with inland bills of exchange.[13]

Now and again the courts are confronted with a vivid illustration of the truth that the best of law-makers cannot provide against all those countless notable things which, as yet, "the ear of man hath not seen and the eye of man hath not heard." The problem is at once baffling and amusing when the case shows, as clear as day, that there is only one fair and just solution, while at the same time no sound technic of reaching that solution seems provided by the law. In *Sutherland State Bank v. Dial* (1919, Neb.) 170 N. W. 666, the suit was on a negotiable note, delivered for value to the plaintiff by the defendant maker. But the instrument had been made payable not to the plaintiff, but to a third party, W, to whom the plaintiff had expected to negotiate it. W, however, could not be induced to take the note, and the plaintiff perforce kept it. Apparently the maker thought this supplied him with a way out of paying the money; in any case, he did not pay, and put

[10] And so of course in Georgia. Code 1911, secs. 4270, 4273. With notes, additional words have sometimes been required for negotiability: "without defalcation," "value received," "payable at the X bank," etc. On the other hand, notes—and not bills—were in some states negotiable, though payable in commodities. So Georgia. Code 1911, sec. 4270.

[11] *Clerke v. Martin* (1702, K. B.) 2 Ld. Raym. 757, 1 Salk. 129; *Buller v. Crips* (1704, K. B.) 6 Mod. 29.

[12] *Cf.* also 1 Daniel, *Negotiable Instruments* (6th ed. 1913) secs. 5, 162.

[13] (1804) 1 Cranch, App. note A, 3 *Select Essays in Anglo-American Legal History*, 72.

the plaintiff to his action. It is evident that the plaintiff realized the irregularity of any suit by him on the instrument; still, finding no other way out, he did bring suit thereon—*in equity,* to save his face. But the plaintiff was not named on the note. There was no mistake or inadvertence in naming the third party as payee, to found reformation in equity; or to let in a suit by the true owner under the decision in *Spreng v. Juni* (1909) 109 Minn. 85, 122 N. W. 1015, on which the court relies.[14] There was no transfer by the named payee, to bring sec. 49 of the N. I. L. into application. Still—and much as such an action on the note seems at variance with the whole purpose and function of negotiable paper—one can hardly criticize the court for allowing recovery. Something had to be done; the *mores* decidedly called for action in some form.

A somewhat similar situation, although one doubtless regulated by the course of business, is presented where a "remitter" obtains a bank draft payable to his creditor, but later determines not to use it; or where a man has his bank certify a check payable to the order of another, and later makes up his mind to use the credit in some other way. One might juggle the law of contract to protect the holder of an instrument in such a case, on some such "interpretation" as that: the bank's promise was in truth to provide a certain amount of credit, to be used in the first instance in the way indicated, but if that should prove undesirable, then to be used in another way at the option of the promisee, on his surrender of the instrument; in the instant case, for example, the "taking for value" of the note might be considered to be "in the intention of the parties" only a loan to the maker, the note being given merely as a very limited security.[15] Or one might work with quasi-contract, and require restitution of the money paid over—or of the credit withdrawn because of the certification—on the failure of an "implied condition" whose actual occurrence the court would require in order to render the contract binding in its strict terms,[16]

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[14] There is language in *Spreng v. Juni* which seems to sustain the decision in the instant case; but that language is not borne out by the case cited to sustain it, and is not necessary to the decision. And the Nebraska court appreciated that the decision involved only a mistaken naming of the wrong payee.

[15] It was negotiable only to a single party; and under any principle of the law of negotiable instruments hitherto, it is hard to see how it could give any procedural advantage to the present plaintiff, even as evidence.

[16] By rigid interpretation of the contract one might of course reach the conclusion that the buyer of the instrument had bought merely the maker's promise to pay a certain person or to that certain person's order; and had bought that promise in utter willingness to gamble on the expectation of profiting by the strict terms of the promise without more. Failure of consideration, as currently understood, can hardly be advanced to change the situation, as the maker is still willing to perform his promise, to the letter.

It may be noted that the "contract" solution offered above, like any doctrine of conditions constructed by the court, savors strongly of quasi-contract—i. e., of paucital duty imposed on man by the law, without his consent.

a condition that the transaction actually work out as the parties expected. Whatever the technical justification of allowing recovery, however, it is believed that the principal case is one of those in which the court should indeed do justice, but must to do justice create new law.

"Squatters' Rights" on the public domain are frequently given judicial recognition. This is as true of mineral lands as of other kinds. To initiate title under the mineral land laws as against the United States, an actual discovery of mineral is necessary; but where a prospector has staked out a claim, has actual *pedis possessio,* and is diligently exploring the ground, he has rights as against a forcible, fraudulent, or clandestine intrusion. This is fully recognized in the case of *Union Oil Co. v. Smith* (March 31, 1919) U. S. Sup. Ct. Oct. Term, 1918, No. 8; but it is held that in the absence of a discovery an oil claim is open to relocation by others if the first locator is not in actual physical possession. A recent act of Congress provides that where several contiguous oil claims have been located under the placer mining laws, the annual assessment work may all be done on any one of the claims, provided it tends to develop them all. This is held to have no application to contiguous oil locations unless a discovery has actually been made on each of them.

The admiralty jurisdiction of the federal courts is not limited by "those trammels that arose from the restrictive statutes and judicial prohibitions of England." In the case of contracts this jurisdiction extends not merely to contracts made upon navigable waters, but also to contracts that "have reference to maritime service or maritime transactions." So in *North Pacific S. S. Co. v. Hall Bros. Marine R. & S. Co.* (1919) 39 Sup. Ct. 221, it was held that a contract for the repair of an existing ship is within admiralty jurisdiction, even though such repairs are to be made after hauling the ship out of the water by a marine railway and upon dry land. Jurisdiction is not restricted to contracts for repairs in dry dock. However, it does not cover contracts for the original construction of a ship on dry land. In a previous case the Supreme Court said: "A ship is born when she is launched, and lives as long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house. . . . From the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction."

Those who are the most ready to refuse to obey the existing laws, whether because of supposed conscientious scruples or otherwise, are ever the most prompt to appeal to the protection of those laws when

their own legal rights are infringed. Those who make the most bitter attacks upon our Country and its Constitution are the quickest to appeal to their protection. This has been amply illustrated during the course of the great war, especially with respect to the Conscription Act and the Espionage Act. In three recent cases, *United States v. Schenck* (1919) 39 Sup. Ct. 247, *Frohwerk v. United States* (1919) 39 Sup. Ct. 249, and *Debs v. United States* (1919) 39 Sup. Ct. 252, the constitutionality of the Espionage Act was attacked on the ground that the First Amendment prohibits legislation against free speech. It was held that this amendment does not deprive Congress of all power, nor create absolute immunity, with respect to any possible use of language. A statute is not unconstitutional because it declares the counselling of murder to be a crime, nor because it forbids a false alarm of fire in a theatre. So a conviction for a conspiracy to obstruct recruiting by words of persuasion was sustained. Such a conspiracy is criminal, irrespective of the means to be used and even though the attempt is in fact unsuccessful. Utterances in furtherance of such a conspiracy are not privileged even though they are "expressions of a general and conscientious belief." The exact line to be drawn between the power of Congress to abridge freedom of speech under the war and police powers of the Constitution and the disability of Congress created by the First Amendment is not fixed hard and fast by the Constitution itself. "It is a question of proximity and degree."

Our courts must continually, and not merely in exceptional cases, make the choice between the new rule and the old. They must continually determine whether the *mores* of our society have so changed as to require the replacement of the old by the new. No doubt a just and correct determination requires the application of the old rule far more often than the adoption of a new one. In *Rosen v. United States,*[17] decided in 1918, the Supreme Court decided in favor of a new rule of evidence, saying "we conclude that the dead hand of the common-law rule of 1789 should no longer be applied."[18] In the recent case of *State v. Herbert* (Dec. 31, 1918, N. J. Sup. Ct.) 105 Atl. 796, the court very properly adhered to the old rule, Mr. Justice Kalisch saying: "Firmly established precedents should not be treated as mere antiquated judicial wisdom and out of joint with modern time, unless the reason which called them into being has ceased. It cannot be properly said that the reason which excludes the husband or wife from giving testimony in a collateral proceeding, to which he or she is a party, charging the other with an indictable offense, is not as sound and forceful to-day as it ever was."

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[17] 38 Sup. Ct. 148, discussed (1918) 27 YALE LAW JOURNAL, 572.

[18] See COMMENT in (1918) 27 YALE LAW JOURNAL, 668, *The Dead Hand of the Common Law; cf.* also (1919) 28 *ibid.* 592.